No. 13746

United States Court of Appeals

For the Ninth Circuit.

CHOW SING, by His Guardian Ad Litem, Chow Yit Quong,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the United States,

Appellee.

Transcript of Record

In Two Volumes

Volume II
(Pages 189 to 240)

Appeal from the United States District Court for the Northern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9-23-55

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vs.

HERBERT BROWNELL, JR., as Attorney General of the United States.

MANDATE

United States of America—ss.

The President of the United States of America

To the Honorable, the Judges of the United States District Court for the Northern District of California, Southern Division, Greeting:

Whereas, lately in the United States District Court for the Northern District of California, Southern Division, before you or some of you, in a cause between Chow Yet Quong, as Guardian Ad Litem for Chow Sing, plaintiff, and James P. McGranery, Attorney General of the United States, defendant, No. 30820, a Judgment was entered on the 17th day of February, 1953, which said Judgment is of record and fully set out in the office of the clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof;

And Whereas, the said plaintiff appealed to this

court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 16th day of July, in the year of our Lord, one thousand nine hundred and fifty-five, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and hereby is vacated, and that this cause be, and hereby is, remanded to the said District Court to make findings as to whether Chow Yit Quong was Chow Sing's father, such findings to be made in the light of the opinion of this court, and thereupon enter such judgment as may be proper.

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the twenty-first day of

February, in the year of our Lord one thousand nine hundred and fifty-five.

/s/ PAUL P. O'BRIEN,
Clerk, U. S. Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed February 23, 1955.

In the United States District Court for the Northern District of California, Southern Division

No. 30820

CHOW YIT QUONG, Guardian Ad Litem for CHOW SING,

Plaintiff,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Defendant.

FINDINGS UPON REMAND FROM THE COURT OF APPEALS

The judgment of this Court having been vacated and the cause remanded by the Court of Appeals with directions to make findings as to whether Chow Yit Quong was Sing's father, such findings to be made in the light of the opinion of the Court of Appeals,

Now, Therefore, for the reasons stated in the Supplemental Opinion of this Court in the case of

Ly Shew v. Acheson, No. 30159-31161, this day filed, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. It is not true that the permanent residence and domicile of the person claiming to be plaintiff is within the Northern District of California or in the United States of America.

2. In substantial respects the evidence introduced by plaintiff was inconsistent and contradictory and therefore not credible. Consequently it is not accepted as true. The burden of proving his citizenship rested upon plaintiff. To sustain that burden plaintiff had to prove by preponderating evidence that Chow Yit Quong was his father. He may be, but plaintiff did not sustain the burden of showing it. Hence, for that reason, the court's finding is that Chow Yit Quong is not the father of plaintiff.

Conclusions of Law

The person appearing before the court as plaintiff in this action is not entitled to the relief prayed for.

Let judgment be entered accordingly.

Dated: March 31, 1955.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed April 1, 1955.

In the United States District Court for the Northern District of California, Southern Division
Civil No. 30820

CHOW YIT QUONG, Guardian Ad Litem for CHOW SING,

Plaintiff,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Defendant.

JUDGMENT

The judgment of this court entered February 19, 1953, having been vacated and the cause remanded by the Court of Appeals, and the above-entitled court, Honorable Louis E. Goodman presiding, having on the 1st day of April, 1955, filed herein findings upon remand from the Court of Appeals, including findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith,

Now Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That Chow Yit Quong is not the father of the plaintiff, Chow Sing.

2. That the relief sought by the plaintiff Chow Sing by his guardian Chow Yit Quong, is denied.

Dated April 5th, 1955.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed April 5, 1955.
Entered April 6, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given this 1st day of June, 1955, that Chow Sing, by and through his Guardian Ad Litem, Chow Yit Quong, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of this Court entered on the 6th day of April, 1955, in favor of the Defendant and against the Plaintiff.

JACKSON & HERTOGS,
Attorneys for Plaintiff.

By /s/ JOSEPH S. HERTOGS.

[Endorsed]: Filed June 1, 1955.

In the District Court of the United States for the Northern District of California, Southern Division

Before: Hon. Louis E. Goodman, Judge.

No. 30159

LY SHEW, as Guardian Ad Litem of LY MOON, a Minor,

Plaintiff,

vs.

THE HONORABLE DEAN ACHESON, as Secretary of State,

Defendant.

No. 31161

LY SHEW, as Guardian Ad Litem of LY SUE NING, a Minor,

Plaintiff,

vs.

THE HONORABLE DEAN ACHESON, as Secretary of State,

Defendant.

No. 30820

CHOW YIT QUONG, as Guardian Ad Litem of CHOW SING,

Plaintiff,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Defendant.

REPORTER'S TRANSCRIPT

Friday, March 11, 1955

Appearances:

For the Plaintiff Ly Shew,
STANLEY J. GALE, ESQ.

For the Plaintiff Chow Yit Quong,
JACKSON & HERTOGS, by
JOSEPH HERTOGS, ESQ.,
580 Washington Street,
San Francisco, California.

For the Defendant:
UNITED STATES ATTORNEY, by
C. ELMER COLLETT, ESQ.,
Asst. U. S. Attorney.

Proceedings

Mr. Collett: I notice, Your Honor, the mandate, after going up, came back; so if the Court wants at this time that it be spread on the minutes again for the Court's attention——

The Court: Yes, the mandate came back once before, and it is filed here, so I thought counsel ought to be given an opportunity to be heard on both sides as to what they think the Court should do on this mandate.

Then, in the meantime, apparently the mandate was recalled.

Mr. Collett: Yes, that is true.

The Court: Now it is back again.

Mr. Collett: Now it is back again.

Mr. Gale: Is there any question but what it is now properly before the Court?

Mr. Collett: No question.

The Court: Here is the new one, just filed.

Mr. Collett: That is right, yesterday.

The Court: Yes, the 10th day of March it was filed.

Mr. Collett: I thought it necessary to call Your Honor's attention that when Your Honor set this on the calendar for the previous mandate, that mandate was recalled, and the matter stood on the calendar and came back yesterday, so that what Your Honor set on the calendar under the mandate previously has been returned to the District Court. [3*]

The Court: Would you gentlemen like to go ahead? You have come from Sacramento?

Mr. Gale: Yes.

The Court: Would you like to go ahead?

Mr. Gale: Oh, I am here for the purpose of going ahead. It is before the Court.

The Court: All right. This mandate may be spread on the minutes of the Court.

I notice that it provides that the judgment is vacated and the cause is remanded with direction to make findings as to Ly Shew (reading mandate) and thereupon enter such judgment as may be proper.

Having in mind that mandate, I felt than rather take the record and make findings myself I ought to hear from counsel on both sides with respect to their views.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Mr. Gale: Has Your Honor read the various opinions that have been rendered in this Court?

The Court: There have been a great many of them at different times. I have read the opinion upon which the order was made, the opinion signed by Judge Mathews and Judge Bone, as I understand it.

Mr. Gale: Well, originally, if the Court please, on August 18th, the matter was reversed with instructions to render judgment in favor of the petitioner. Then a petition for rehearing was filed. Upon the petition for rehearing it [4] was remanded for this Court to make findings in the light of the opinion. Then there have been subsequent opinions upon rehearings of the denials and opinions.

But, in any event, the matter is remanded to this Court for findings.

Now, the principal opinion of this court is based on this situation: If Your Honor will recall, in the exhaustive opinion that this Court prepared in the case the Court declared that the clear and convincing rule of evidence was applicable in these types of cases, and that you were denying the relief requested not because you were deciding that he was or was not the father of the children, which of course is the matter in issue, but because the evidence was not clear and convincing to this Court.

And according to Your Honor's opinion in that case, you said in your opinion,

> "The Court does not find that the Plaintiff and his witnesses"—no.

"Since I find the evidence presented in this cause to be neither satisfactory nor clear and convincing, they have not sustained their burden of proof."

Then you said:

"The Court does not find the Plaintiff and their witnesses are not telling the truth, but [5] rather, I cannot tell whether they are or not. Their evidence has neither the satisfactoriness or convincing character which justifies, in effect, conferring of American citizenship."

Then you went on to say,

"It may well be that Ly Shew is the father of the two plaintiffs. In denying the relief asked for I am not saying that he is not their father. I am denying the petition because the evidence does not meet the proper standards."

Well, that is where the upper court remanded the matter to this Court. The upper court, without going through the five opinions that have been written, it boils down to this:

The Court said, first, that the rule of clear and convincing evidence is not applicable in these cases, and all judges, despite the defense and concurring opinions, and so forth, said that, "However, it appears to the District Court's opinion, from the District Court's opinion, the District Court proceeded on the theory of the burden of proof resting on Moon and Ning was different from and heavier than ordinary burden of proof resting on plain-

tiffs in civil actions, a theory which was and is untenable. We hold that Moon and Ning's burden of proof was the ordinary one."

And all the opinions go on to say that we have to prove our case by a preponderance of the evidence. [6]

Then the opinions go on to say, however, it is for this Court to decide whether or not you are going to believe the witnesses or not, and the lightest opinion says although the evidence is uncontradicted, it is for this Court to decide whether or not to believe it.

So it is remanded to this Court for Your Honor, in effect, to be omnipotent, I might say, and decide is Ly Shew the father of the said children or not, and that is the decision this Court has to make, based on the theory that they are only required to sustain their burden by the ordinary burden of proof.

The Court: I think that is a fair statement.

Mr. Gale: That I think is the decision that is before this Court. So Your Honor is either going to say that Ly Moon is their father, or Ly Moon is not their father, and that is the case.

Mr. Collett: Your Honor, for just a comment, I think this matter presents as a thoughtful consideration the very interesting posture not only of the Judge of this Court but the American Consul in Hong Kong, in the first instance, and everyone who purportedly represents the United States along the way.

Your Honor, I think quite likely and honestly

recognizes the situation is presented in which a person comes forward and makes certain assertions and the burden is upon him in [7] order to establish it, and that burden is not sufficiently sustained in Your Honor's opinion. But you can't reach a black and white decision in which you can positively state that all possibility of a contention are excluded. He has simply not sustained his burden; therefore, Your Honor did not hold directly that the individual who made the claim is not the person that he claims to be, or that Ly Shew is not the father. You simply stated that there are shades of grey in this matter and that the burden so far as the contendants, the plaintiffs, was concerned, was not sufficiently sustained.

Now, although Your Honor used several words, and in the findings, the way it read, used somewhat similar words—The portion Mr. Gale quoted at page 45 of the transcript stated:

> "I find the evidence presented in support of Plaintiff's cause neither satisfactory nor clear nor convincing."

Apparently, if we extended the meaning of those words, what "satisfactory" would be, what "clear" would be, what "convincing," that it was neither sufficient in the ordinary nor in the clear and convincing sense, that might be considered as such, depending upon what Your Honor had in mind.

That was your state of mind as you considered the evidence and endeavored to make your opinion, and the finding that was [8] founded upon that stated

that the evidence was not sufficiently clear to convince you.

I think Judge Roach in a later opinion used the same terminology and decided the other way, it wasn't of sufficient clarity to convince.

Now, using the statement of words, "of sufficient clarity to convince," to get to the imponderable problems of burdens of proof and the difference between going from a preponderance of the evidence to clear and convincing to beyond a reasonable doubt is a matter of degree, and a matter of degree that, how any particular individual might embrace it and how a decision might be related to it, that would of course be related to that person.

So Your Honor is in the position of purportedly reconsidering this evidence and stating that on the standard of proof which the Ninth Circuit says should be the ordinary standard of proof, whether the evidence satisfied that burden.

But in reaching your conclusion you can't resort to any shades of grey about the matter. You must come to the conclusion either he is he is not, and that constitutes a finality in the matter and doesn't leave anything in doubt. That's the way it seems to me, that the opinion has disposed of the particular question which is raised here. There isn't any room for the Court having any doubts about the matter. So far as the judgment is concerned, it must be either black [9] or white.

Mr. Gale: May I say one thing, Your Honor?

The Court: Certainly.

Mr. Gale: I presented this view to the Circuit Court and I think it is very applicable.

I think these cases are no more nor less than a paternity case. I don't know whether Your Honor has ever judged a paternity case in which a person claims to be the offspring of a certain person and claims either recognition or asks for support as a legitimate child or for support and we go through the ordinary trial.

No one usually is present at the actual act of conception. We have to follow the other methods of proof that are adduced.

I think it is entirely fair to say that Your Honor should look at this case just as though it were a paternity case and let's say, these children were seeking support from their father on the theory that he is responsible for their support, and not clouded by the fact that they are of Oriental extraction, that they are Chinese, just treat it as any other case, and have they shown enough, and particularly where their evidence was entirely uncontradicted. If it were that type of a case, would it warrant a judgment in their favor?

I think that is entirely applicable to these proceedings.

It's true the goal sought might be a little bit different, [10] it is citizenship, but it still boils down to the basic fact of is he their father or is he not their father, and have they convinced this court or haven't they.

It is a difficult decision the Court has to make, but that is what the upper court says you have to

do. You have to be a Solomon and say, are they or aren't they?

The Court: I am in doubt whether it is necessary to comply with this mandate of the Court of Appeal, because I don't think it is necessary for the Court to find whether or not Ly Shew is the father of Moon and Ning. Although the mandate says that, I think all the duty of the Court is to find out whether the evidence—make a finding on the evidence as to whether or not it is the children of him.

Mr. Gale: Well, here is the mandate of the court. It says, "The judgment is vacated and the causes are remanded with direction to make findings as to whether Ly Shew was the father of Moon and Ning, with such findings to be made in the light of this opinion."

The Court: I know it says that, but I am just wondering whether or not, supposing I were to hold that the preponderance of the evidence, or whatever standard it is that the Court of Appeals refers to as the "ordinary one," that by an ordinary standard the evidence is sufficient to show that Ly Shew was the father. I still wouldn't necessarily have to do anything more than to hold that the evidence so shows. [11]

Likewise, if I were to come to the conclusion that the evidence does not show that he is the father, then I make that finding. It isn't necessarily the result that I have to decide whether he is the father or not. I just simply decide that the evidence does not establish the fact or does establish the fact.

Mr. Collett: I think you are confronted with the judicial process at that point, if the Court please. You make that finding and then it follows as a conclusion of law that he is not. You don't actually become involved in that, but it follows as a conclusion of law that he is not.

The Court: I think—I don't need to be critical of the Appellate Court's decision because I have sat there in many cases myself. But I think that they make a mistake when they refer to that as—that's a conclusion of law which nullifies it. All the Court finds is the facts.

I may be getting rather technical myself over it, but I think, for instance, if I were to hold that by ordinary standard the evidence is not sufficient to show that Ly Shew is the father of these two young people, it doesn't follow that I have to make a finding of fact that he is not their father.

Mr. Collett: No. No. But you have run into the fact that this manner that is before the Court is an adversary proceeding, whereas it is ultimately a political matter that [12] has been processed through the administrative procedures and the person was either admitted or he was not admitted on the contention that was made and therefore it was subject to review.

But here it's projected into this Court as an adversary proceeding in which contentions are made and apparently controverted and must now be resolved in accordance with the ordinary judicial procedure, which means findings of fact are drawn and conclusions of law which resolve out the con-

tentions which are made. And the final conclusion is that he is not, and it is upon that basis that I think Your Honor must act. You can't leave it in a state of grey. You must come to the conclusion that having found that the burden of proof is not feigned, that as a conclusion of law you must find that the person is not.

It doesn't leave any leeway, and it almost follows from the premises established that you have to draw that conclusion. It doesn't become a matter of fact, it is a conclusion of law. It seems that that is the position that the matter would be left in on the opinion that has been written here, the mandate that comes down to this Court.

The Court: Well, I suppose I will have to wrestle with what kind of findings to make in this case.

Mr. Gale: Well, I think that Your Honor has to make the decision that either you will or will not grant the [13] relief prayed for.

The Court: Yes.

Mr. Gale: And from that point, either one of counsel, either Mr. Collett or myself, will submit findings which we feel applicable, and we can take that burden off the Court, and if the Court doesn't agree with us, you can revise the findings.

I think that is the decision this Court is going to make. I didn't want to argue the facts, and I think the facts are well before the Court.

But I think that certainly, Your Honor, as an ordinary adversary suit, nothing more, nothing less, measured by the ordinary standard of evidence, having the burden of proof and having proven our case

by a preponderance of the evidence and, as the Courts point out, without conflict and without any testimony to the contrary, that the petitioners——

The Court (Interposing): Well, Judge Roach just rendered a decision about a month ago in a case in which he squarely held that it doesn't make any difference whether there is any contradictory evidence or not. If there is only one witness testifies in favor of the plaintiff—I don't believe it was a citizenship case. I believe it was an immigration case.

Mr. Collett: It wasn't a 903 case, but it was a claim of citizenship. [14]

The Court: Was it?

Mr. Collett: Yes, it was.

The Court: In which he squarely held that since he didn't accept the testimony and didn't believe the testimony of the plaintiff, he decided against him irrespective of whether or not there was any contradiction to it by anybody.

Mr. Gale: Well, the Circuit Court points out in their opinion, Your Honor, that you are not bound to believe it. The original opinion says that, being uncontradicted, it must be accepted by the Court. The subsequent opinions point out that you are at liberty to believe or disbelieve the evidence, and that is for this Court to determine.

I merely suggest to this Court that measured by any ordinary standard, and by any case in which I have otherwise been involved, we have certainly, in my opinion, sustained our burden of proof. But that's for this Court to decide.

The Court: That is a problem, of course, I don't think any appellate court fully realizes, the difficulty of relating these cases to the ordinary standard of cases. And because of the difficulty of the Court in evaluating the testimony, that brought about my statement of the rule which I thought should be applied to this type of case.

It has nothing to do with whether they are Chinese or Mexicans or Greeks or anything else. I don't know why Judge Denman put that in his opinion. In the whole picture of the [15] case it is the great difficulty that every judge who has decided these cases has expressed, the great difficulty of appraising the testimony.

That is not the fault of the judge. It isn't the fault of the law. It isn't because the judge hasn't the mental mechanism to cope with it. It is just because of the peculiar nature and circumstances of this and other similar cases that presents a problem of the greatest difficulty.

And since we have in a great number of similar cases of a similar kind found that there has been fraud and chicanery and lying and everything else involved in them, we approach them with caution. It is because of the general circumstances of this and similar cases. It makes it difficult to appraise the testimony.

It's all done in a foreign language. And the difficulties involved in appraising the testimony given through interpreters, where rarely you have anyone who is able to speak firsthand as to the facts and speak our language. The difficulties involved in that,

the way the situs of the alleged birth of the individual is not accessible—not inaccessible any more because they are Chinese than that they are Greeks, but inaccessible because of the physical conditions existing. All those conditions make the problem a very difficult one.

I am not the only one that has had those problems. Other judges have written about it and have spoken about it and had [16] the problems in similar cases. So it isn't something that is just a figment of the imagination. It is a very difficult problem.

And the rule that I worked out in this case, and which the Appellate Court rather summarily dismissed—which, of course, was within the power of the reviewing judge to do—seemed to me to be one that fit the circumstances of the case. Other courts have devised special rules in all sorts of cases in order to weigh evidence where the problems presented were unique and circumstances were difficult.

So that is the reason why I came to that conclusion in this case. I just wasn't convinced by the evidence in this case that, in the shape it was in, that the evidence satisfied me that these two youngsters were the children of Ly Shew.

It is true I imposed a different standard of proof. That is, I suggested, declared according to my view, a different standard of proof. But the problem still remains just the same.

If I were to make a finding now that Ly Shew was the father—I say that in all fairness to counsel

for the Plaintiff—if I were to make a finding and I would be prepared to say so in a supplemental finding, if I were to make a finding now and find as a finding of fact that Ly Shew was the father of these two children, I would be making the [17] finding not of my own volition but under some command from another judge.

Now, if another judge who has the power to make a decision wants to make a decision to that effect, I have no quarrel with it, because another judge might decide it another way. But I don't see how I could in justice and in good conscience make a finding of fact because some other judge tells me I should make a finding of fact. It has no reason to it at all. There is no reason behind that at all.

If another judge wants to direct that judgment be entered, that's a different matter. It might be well within the power of the Court to do that.

I am merely speaking at random, gentlemen, pointing out that there is a problem of findings in the case, and that is why I thought I ought to have the view of counsel in the matter.

Mr. Gale: Your Honor, may I point this out: The words "clear and convincing" and "preponderance of the evidence" in themselves are not a mathematical formula. They only mean what they purport to mean to the particular judge who is considering the particular problem. You and I might have an entirely different, and probably do have an entirely different definition of what those mean, of what constitutes either "clear and convincing" or "preponderance of the evidence."

It isn't a mathematical formula like two and two make four. [18] It is that standard which happens to be applicable to the particular intellect or mental process that is considering that particular problem.

Now, Your Honor took a certain standard, a very high standard. Let's reach it here and say (demonstrating), "That is what I consider clear and convincing. The evidence just didn't reach that standard so I can't grant the relief prayed for."

Now, the higher court, as all agree—whether we agree with it or not, at least under our judicial system that is the higher court—they said, "No, Your Honor, drop your sights a little bit." That in effect is what they have said, "Drop your sights a little bit. Let's divorce this completely from the fact—if you can do it, let's divorce this completely from the fact that in other cases other persons of the same race have not told the truth, have committed fraud, have been guilty of various other offenses. Forget, if you can, the fact that the language comes to you in an interpreted form. Forget, if you can, some of the political situations that are now involving us. At that time and at the present time possibly we are involved in acts of war and aggression with people of the same race. Divorce that from your mind, if you can, and consider it just really on the basis of one case, Ly Shew and his two children."

Perhaps the Court can't do that. [19]

The Court: That's just the problem. You have stated it very adequately. It is a very difficult prob-

lem. I have great difficulty in knowing how to proceed.

Mr. Gale: Maybe if Your Honor——

The Court (Interposing): I have just as much difficulty in proceeding upon the theory of making a finding that he is the father as I have that he is not the father. The same difficulty that existed before exists. And I haven't been helped any by the Appellate Court. I mean, it doesn't make much difference about the standard.

Mr. Gale: It isn't the standard. It is what are you going to—You may take the standard of the preponderance of evidence, and in your mind the standard that you hold to be the preponderance of the evidence might be exactly the same standard that another judge might hold to be clear and convincing.

Do I make myself clear?

The Court: Yes.

Mr. Gale: In other words, no court can tell you, "We reach a certain mathematical equation and at that point we reach the preponderance of evidence, and then we add some more weight to the scales and then we reach the clear and convincing."

But I just have to venture this one observation, if I can. I think Your Honor in all fairness and as part of the [20] judicial process should attempt, so far as it falls within human ability and judicial ability to do so, to just merely consider this as one case, the case of Ly Shew and his two children, and not whether they are yellow or white or red, and just consider it as another case come into your court,

removed from the other 7 hundred 903 cases pending, removed from the fact that a war is going on, removed from the fact of fraud, and say it is an ordinary adversary case, which the Court said it was.

I think we are agreed Your Honor has to consider these things, because it is your mental processes that must be convinced. Mr. Collett and myself are never going to agree on it. Obviously we have different standards and for very different reasons.

Mr. Hertogs might have something to add to this thing. I know he has the same problem and a similar situation coming up.

Mr. Collett: If I may have a few more words on what counsel has said, it is all well and good to try and detach yourself and build up some hypothetical measuring rod in the case that supposedly indicates that up here is "clear and convincing" and down here is something else.

But here the fundamental premise upon which counsel would proceed is not fair. There isn't an adversary proceeding here because counsel was in the same position Your Honor was [21] in to begin with. He is in no position—and I am not looking at the manner in which the Court of Appeals avoided the same problem here that they purportedly met in Fong Wong Jing and the Seattle case.

The allegation in this cause is that for over four years last passed, "the said minor has presented sundry and various applications to the American Consul at the British Crown Colony of Hong Kong for permission to enter the United States as a citizen thereof and/or for the purpose of having his

claim for citizenship passed upon and adjudicated by the Immigration and Naturalization Service."

That was denied on information and belief.

Now, to begin with, the individual comes from nowhere, out of the obscurity of remote regions, unknown to the individual who represents the Secretary of State, and says, "I want some documentation to go to the United States. I want to go to the United States as a citizen."

Purportedly, although the record in this case didn't disclose it, the Consul says, "I don't know who you are. I am not going to give you any such consent, such permission, such documentation," and the next thing a suit is filed in this Court. And he comes in here and says the same thing to your Honor.

Now, adversary proceeding is purportedly the resolution of conflicting testimony introduced here and introduced there, [22] and you resolve it out and come to something that is supposed to be the preponderance of evidence.

But here you have an advancement of a claim—an advancement of a claim that a person says, "I am so and so and so and so; I was born such and such; I am the son of so and so," and nobody knows a thing about him other than what he says himself. And by the means of so-called measurement this Court is placed in the position of endeavoring to resolve out at what point has this individual established enough that he can say, "I am now satisfied that he is what he claims to be, and the relationship

is there, and he should be allowed to enter the United States as a citizen."

Now, I think in other arguments it has been referred to, suppose your Honor were to become responsible as a guarantor, or legally for a sum of money, and the question was whether this was the person to whom the money should be given. At what point does the mind say, "Well, I will assume the responsibility and endorse the check or sign the document, give the authority, permit a person to proceed further," and thereafter leave open the question as to whether any responsibility or liability will revolve back upon you as the individual who made that authorization.

Now, it is somewhat equivalent to that situation. Only here we have no responsibility on the judge's part. It is American citizenship which is sought and entry into the [23] United States as such.

So that you don't have the matter of preponderance of the evidence involved. You have the question, has the evidence reached the point where the judge is satisfied.

He can't resolve all doubt, no matter which way it might go. But something has to be there that he inwardly feels. Although the word "feeling" is one that is most intangible—most intangible, and you find it so often in the opinions. The judge says, "I feel." Well, what does he feel? Where does he feel it? In his big toe or in his left ear or where? If he asked himself the question, he wouldn't know where he felt it. But at a point he resolves it out and says, "Well, I feel so and so."

And I think so far as the preponderance of the evidence is concerned, that in the judge's mind he well knows the manner in which he finally resolved out the case, knows the extent to which after he has rendered his opinion it is going to be vulnerable and subject to attack in the Appellate Court, and having that in mind, why, he decides it in the way he thinks. The truth and the justice of the case purportedly calls upon him to do so.

But here is that intangible element that the thing comes from one side and the person says, "I am so and so and I am the son of so and so," and your Honor has to somehow or other reach the point where he is satisfied. [24]

Now, your Honor used the word "satisfied." You used the word "clear." You used the word "convincing." Actually, I don't think that you really interposed here a so-called clear and convincing standard in terms of the ordinary processes of, as Mr. Gale would illustrate, that up here is a level and down here is "beyond a reasonable doubt" and here is "clear and convincing" and here is "preponderance of the avidence." And you have purportedly the scales of justice, and at some point the scale goes this way or that.

You don't have any scale here, actually. And the words that we use are related to the actual problem, that the judge is satisfied that the claim is sufficiently founded upon evidentiary matter that has probative value or worth, sufficiently clear to satisfy him that the claim is good.

Now, beyond that, I think we could talk on and

on in terms of so-called preponderances and so on.

Lord knows, between Mr. Hertogs and Mr. Gale and myself, I think regardless of whether we may differ, I think we have endeavored in these various cases to talk to the Court of Appeal, endeavored to convey to them the problem that is presented here. And the fact that in this case alone, the opinion that was originally filed and the manner in which it later was ignored, judgment was vacated and sent back——

The Court: To use the language of the street, it is a passing of the buck. [25]

Mr. Gale: They passed the buck right back to this Court.

The Court: It is a difficult problem and all the judges have trouble with it. But I will be glad to hear what Mr. Hertogs has to say.

Mr. Gale: Let me add one comment, your Honor. I do not think that the—Well, let me put it this way:

I think that as between the judges, including your Honor, that there ought to be—and I suggested this to the higher court. They said, "Well, here is the rule," but didn't say how to apply it.

I don't think that the outcome of the case should depend on the individual judge that happens to try the case. Now, no reflection. I mean this:

One judge may say, "I will listen to the case with my ears closed and nothing will ever convince me," whereas another judge may, on exactly the same evidence, reach an entirely contrary de-

cision. That is not right, either. That is not what the judicial process means.

The Court: What you are saying there is a criticism of the entire judicial system. If there were some standard by which every judge would have to act in every case, and he would have to act that way, you would be a rubber stamp. You wouldn't need judges for that. It stands to reason that the human being, the judge who happens to be in the position, is the one who has to make the decision. [26]

Mr. Gale: Well, that's what makes these cases so difficult.

The Court: I don't know what you can do about that. One may decide it rightly or wrongly according to a third person's lights, and that still doesn't change the standards that are involved.

I don't think that that is—As a matter of fact, I think all this comes about, it is evident to me—I think as well as to some other judges that have more familiarity with these cases—that it is very difficult to apply a standard.

Mr. Gale: Oh, very difficult.

The Court: Because of the nature of the cases. That is all there is to it.

I agree with Mr. Collett, this is not an adversary proceeding of any kind. I don't think that was ever considered. The very language of the statute negatives that. It is a suit to declare American citizenship.

It is true it has to have as a basis for it the fact that somebody is denied some right of citizenship.

But what the Court is called upon to do is not to declare that "A" gets judgment against "B" for anything at all. By the very terms of the statute this is declaratory of citizenship.

I don't know how anybody can get away from that fact. That is what the statute says. That is the jurisdiction that is conferred, to declare whether a person is or is not an [27] American citizen.

The reason jurisdiction is invoked is because some official or government has said to Jones, "Well, I am not going to let you vote here," or "You can't come into the United States," or some other specific act which denied a man a right which he had if he were an American citizen.

So the statute says, it has given the Court the authority to declare whether a man is a citizen or not. That is really the basis upon which I proceeded in trying to formulate some rule that would be helpful. Apparently the judges up above didn't agree with that, although they have not yet held that this is an adversary proceeding of any kind.

It still is a proceeding to declare citizenship. Now, it doesn't make any difference what kind of standard you apply. I think the Court has to decide whether the person has presented sufficient evidence to show he is an American citizen. That is all.

Mr. Gale: That is it.

The Court: I think that is it.

Mr. Gale: But this is the point, your Honor: The finding of citizenship is ancillary or supplementary to the basis upon which the finding is made.

In other words, if the children are the children of Ly Shew, then they are citizens and there is nothing that the Court or anyone else can do about it. They are citizens and [28] that is it. If they are not his children, then they have no basis for a claim of citizenship.

So I think that the cart has to come before the horse, so to speak, and that while they say, "We are citizens," their claim is based upon the fact of paternity.

Now, your Honor might, as your Honor suggested, make the finding without the direct finding as to paternity; but it all gets back to that, because if your Honor determined that they are citizens of the United States it could only be based upon the finding that the relationship exists.

I don't see how very well we can get away from that fact.

The Court: Perhaps you are right about that.

Mr. Gale: As your Honor suggested, the higher court avoided making that determination, and they sent it back here for you to, again I say, to act as a Solomon and decide who is the father of these children. It is difficult. We don't deny that, but still I think the problem the Court is going to be faced with—and this is not the first difficult decision this Court has been faced with——

The Court: Certainly. Well, do you want to make some comment?

Mr. Hertogs: Well, your Honor, I have the next case on the calendar, which is identical to this case.

The Court: You might call it, and get it in the record so that we have it. [29]

The Clerk: Quong vs. McGranery, hearing on findings.

Mr. Collett: Now, that is the Chow Sing case.

The Court: This is Chow Sing.

Mr. Hertogs: Yes.

The Court: This is the case where they had previously affirmed on another ground, isn't it, and then remanded it?

Mr. Hertogs: Yes. Remanded back for reconsideration in the light of the decision in the Ly Shew case.

The Court: Then it is the same problem?

Mr. Hertogs: The same problem, and I ask that the remarks which have been previously stated on the record be considered as part of the hearing on the Chow Sing case.

Your Honor, I think the Court and counsel have more or less rather clearly expressed the views. However, I want to stress that last point which Mr. Gale raised. I think it is a most important point.

I think that the first determination and the major determination for this Court is the question of relationship. I think the rest of it will fall into line and there isn't a real opportunity for the Court to make any other determination than the determination of relationship.

If the relationship is established, United States nationality follows as a matter of course. If the

relationship is not established, they must be deemed an alien.

Now, in Mr. Collett's remarks he talked about the burden [30] of proof and the feeling that the court gets, and he feels that that feeling is the guidepost to be determinative of whether or not the relationship has been established.

Now, the Court has stated that previously the Court felt that there was not sufficient evidence in either of these cases to establish the claim of relationship, and that it didn't meet the standard of proof as announced in your Ly Shew opinion.

In this trial case, your Honor, right in the record at the conclusion of the case you made the remark that just meets the standard set forth by Mr. Collett; at that time you said you had the intuitive feeling that this was this man's son. Now, if at the conclusion of the trial this Court found that it had the feeling that this Plaintiff was this man's son, I say there is only one thing the Court can do and that is to make findings that the relationship exists. Once the relationship is established, as a matter of course and in pursuance of statute a finding of nationality must follow.

I well realize that the Court is going to have a difficult time reviewing the cases because, as the Court knows, I think it was two years ago when we went to trial on most of these cases, and during the intervening time the Court is not going to remember the witnesses. I don't think the Court is going to be able to recall any one specific [31] individual.

The Court: I have the transcript.

Mr. Hertogs: You may have the transcript, your Honor, but that's just cold writing. Lots of times I think the impression the witnesses make on the Court considerably influence the Court in the final determination.

And I think the Court should give some consideration to the fact that considerable time has passed since the time of the original trial in each of these matters.

Now, the remarks which were extended on the record in the trial case indicate that the Court had that feeling, that the Court felt that this was this man's son. And in the light of the decision of the Supreme Court of the United States, which was cited by the Court of Appeals here, not only in the recent decision but also an entirely different panel in the Mar Gong case. They cited that Supreme Court decision in which the Supreme Court said, "It is better that many Chinese immigrants be improperly admitted than one natural born citizen of the United States should be permanently excluded from this country."

Now, if the Court has that feeling, that the relationship existed, then there is the possibility that the Court would be denying an American citizen the right to remain in this country if the Court made the finding that the relationship did not exist.

I think that the standard in these cases has been pretty [32] well pronounced in the various opinions. I will state, however, that there has been considerable conflict in the numerous opinions which we

have received from the Court of Appeals. But I think that the standard that is set is the standard which is ordinarily followed in any other civil case and that no special quantum of evidence shall be required in these cases. As to what that actually means is something for the Court to determine.

I think there are other problems in the case which should be probably presented very lightly, and I think one is, in my particular case, at the time of the prior findings of the Court the Court made the determination that the plaintiff did not have a residence in the United States within the meaning of Section 503. I think that that has been more or less readily disposed of in the numerous opinions of the Court of Appeals in the meantime holding that the Court has jurisdiction in these matters.

The Court recalls, in the original case, as well as in the discussion which we had with your Honor, it was the Court's opinion that the broad purpose of the Act was not to apply to those children who had been born abroad. That issue was brought forward by Mr. Collett and argued quite extensively on appeal and lost, as well as in numerous other arguments on jurisdiction, all of which have been lost.

I think the findings of the Court, then, should be limited [33] to things which would protect the records in case plaintiff herein finds it necessary once again to take judicial review in the Court of Appeals.

I would ask your Honor in the Chow case to give

due consideration to the remarks of your Honor at the conclusion of the trial in that case.

Mr. Collett: If I may have a moment to reply to Mr. Hertogs, if the Court please, I notice two things here first:

When I was referring to the matter of the feeling of the Court and the number of times one observed in the opinions the words "I feel," I wasn't advocating anything in the nature of an "I feel" test, and that is entirely a misunderstanding on the part of Mr. Hertogs as to what I had to say. I was simply illustrating for the Court various approaches in which the mind of one individual man such as yourself may endeavor to consider these particular problems.

I was also interested to note that Mr. Hertogs when he states to your Honor that reading a cold record here does present some difficulties, as your Honor was constrained to observe in your opinion, you had before you the witnesses in all cases and, had you observed them, you reached a conclusion which was related to the credibility and the extent to which you were going to believe them; and your Honor had several times observed that when a cold record gets before the court above, that they are endeavoring to proceed [34] under rather great limitations.

Now, cases have been cited by both counsel here reviewing records of the immigration on the habeas corpus, in which it is contended at great length that the Court reviewing the case, and going down the line, setting up every sentence, there are no incon-

sistencies, no discrepancies, and therefore that's it. On the other hand, we find, if there are discrepancies, they are not material.

And although the Supreme Court has said that the Court of Appeals or this Court was not to substitute its estimate of the credibility of the hearing officer at immigration—Mr. Hertogs knows that. At least he has been educated to the extent by the arguments that we have had in the Court of Appeals.

But to go on now with this one case. I didn't say anything about this case when Mr. Beale was here. But let's look at what happened here. I think this is most interesting.

The original opinion filed on August 18, 1954, procured——

This is the four cases up there. There was the Ly Shew, Fong Wong Jing, ..., and this case. This is Chow Sing vs. Brownell. It's after This is Chow Sing vs. Brownell. It's after Immigration. Fong Wong Jing and Ly Shew were the Secretary of State, and Hung was the Attorney General, after the District Court had given judgment contrary to the findings of the Immigration hearing.

Now, the manner in which Judge Denman set about to [35] maneuver these cases and decide one and then the other, and then came around to Ly Shew, and picked Ly Shew out to go after, if I may use the expression, your Honor's opinion and the various matters that were taken into it, and deal with it specifically and go down the line and

treat it, if I might characterize it, a bit roughly, was extremely interesting.

Now, they took Fong Wong Jing—the judge did —and that decision was affirmed. Now, Chow Sing was likewise affirmed, procurium. With Lee Fong Hong, they affirmed his likewise and they disposed of the jurisdictional contentions that were made.

When we get to Ly Shew, they very casually brush that all aside, "Now we are going to take that opinion and go after that so-called standard of proof which is indicated in that opinion," as Judge Denman so conceived.

But in this case, Chow Sing, following the words of Mr. Hertogs, "We find the evidence sustains the findings." Although the findings was that your Honor was not satisfied with evidence of sufficient clarity. Very interesting.

"The questions raised concerning the jurisdiction of the District Court are disposed of by Ly Shew—(reading)"

That was filed and opinion substituted. This opinion was substituted for the first opinion procurium in Chow Sing. In Ly Shew the opinion was not substituted. Apparently the [36] opinion of Judge Denman was not treated as an opinion at all because Judge Bone defended from it and Judge Mathews had not signed the opinion but had simply concurred in the result. So when Judge Bone and Judge Mathews concurred in an opinion, that was filed as an opinion and the judgment of the court was vacated.

In this opinion, however, the findings which is

the same one, Judge Mathews said the finding was not clearly erroneous. Citing it. Quoting it.

"The District Court found the Plaintiff, Chow Sing, did not produce evidence of sufficient clarity to satisfy a conviction of this Court that Chow Yit Quong was the natural blood father of the person known as Chow Sing, or that the person Chow Sing who appeared before the Court claiming to be Chow Sing is in truth and fact Chow Sing. Thus, in effect, the District Court found that Chow Sing had not sustained the burden of proof. The finding is not clearly erroneous."

The finding was approved.

However, because of the defense, apparently, or whatever has gone on in the Court of Appeals in the Ly Shew case and the opinion there in which Judge Denman made so much that your Honor had set up as standard of clear and convincing proof, which is related to the contention that Mr. Gale has made that you have up here "beyond a reasonable doubt" and [37] here "clear and convincing" and here "preponderance of the evidence," that somehow or other was injected in here. Judge Mathews in the Ly Shew case here, instead of reversing the judgment, sent it back and then afterwards, when the further petition for rehearing were filed, or they considered it separately, or their attention was called to the fact that the same findings was in this Chow Sing, which had been affirmed by Judge Denman in the first place, procurium, which was later affirmed by the substituted opinion, they

felt constrained to send that one back for the same reason.

Now, I say that the Court in clearly passing upon your Honor's finding, recognized what I was advocating a few minutes ago: That considering the posture of these cases, it isn't a clear and convincing standard in the ordinary concepts of an adversary proceeding that your Honor had applied here. You simply stated that the evidence was not of sufficient clarity to satisfy you. Which is exactly the proper standard, apparently, and the Court in passing upon it, when their minds were considering it, without the conflicts which have existed on extraneous matters, which may now so well be considered due to the fact that Judge Denman filed such a lengthy opinion that apparently was so very critical of the opinion of this Court, that it disturbed them enough so that they have sent both of those cases back.

Now, I say herein regard to both counsel that we stand [38] here as officers of the Court, and that citizenship of the United States and the judicial procedure of the judicial system of the United States is likewise before all of us. And our responsibilities here are to help this Court to reach a proper standard in that people who have claims to being citizens of the United States, who have never been here before, whether they are Chinese or whether they are Russians, or of any country of the world, when they come forward and make claims, we must all stand and uphold the standards that they don't come in here on mere scintilla or mere

suggestion or no proof whatsoever, simply because it may satisfy some particular attorney that he has a client, to let that individual come in.

We should stand together before the Court to help the Court sustain the proper standards upon which people who claim to be citizens can be admitted as such without any preparation of any kind.

So that, your Honor, I think with those words of mine, in considering these two opinions, that you may well be guided that the original standard that you applied was not a clear and convincing standard in the ordinary concepts of adversary proceedings, but was the proper standard which the Court has well passed upon from the beginning, procurium, all three judges, Judge Denman concurring, and now the other two judges with no indicated dissent so far as this Chow Sing [39] case is concerned, but because of the Ly Shew case and the difference, whatever it may be, that this case had to come back.

Mr. Hertogs: Just a short reply, your Honor.

I certainly wholly agree with Mr. Collett, in the first place, that United States citizenship is probably something that is to be cherished and upheld, not only in this Court but everywhere; and I think that we, as counsel, representing these plaintiffs, are attempting to establish true claims of United States nationality.

Congress has prescribed the standards for acquiring United States citizenship. Congress has stated, and this statute has been on the statute books now since 1875, that a person born abroad of

a United States father shall be deemed a United States citizen.

We feel that we have clearly established that these people are, under the standards set by Congress, entitled to United States citizenship. I say that we are attempting to prove to this Court by evidence the fact that these people have established the validity of their claims.

I say on the other side that the same thing is true for the counsel for the Government, and it has been stated before the Court of Appeals many times in the past, that the Government has as great a burden to establish the claim of validity of United States citizenship if it exists as they have to establish [40] alienage.

Take, for instance, this Fong case that Mr. Collett has referred to. It was not until the day before the petition for rehearing was denied in the Circuit Court that I learned that at the time that we proceeded to trial in this Court, and at the time that we argued the case in the Court of Appeals of the Ninth Circuit, the Government was in possession of a file which clearly showed that these people had been denied a privilege by the American Consul in Hong Kong. Yet counsel came before the Court, and came before the Court of Appeals, and that is the basis of the rejection of that claim in the Court of Appeals, that there never was a denial by the American Consul in Hong Kong. Yet at the time we proceeded to trial, and at the time we argued the case in the Court of Appeals, the time the Gov-

ernment filed its petition for rehearing, the time I filed my petition for rehearing, the United States Attorney's office here in San Francisco was in possession of a record which had been forwarded from the American Consul at Hong Kong through the Immigration and Naturalization Service in San Francisco, and it was in the possession of the office here.

Now, failure to disclose that fact has prevented these people from having a judicial determination of their claim of United States citizenship. I think that that is just as wrong as anything could be. There is just as great a burden [41] on the other side to establish the claim, if it exists, as there is to establish alienage.

Now, turning to this case here, the Chow Sing case, there are some factors which have not been brought out to this Court. There were in the decision handed down on August 18, 1954. There are subsequent opinions of the Court of Appeals. I think on September 17th, 1954, the Government filed petition for rehearing in all four cases. I filed a petition for rehearing in the Fong case as well as the Chow Sing case.

Subsequently, on November 23rd, the Court of Appeals handed down two new opinions, substituted in lieu of the opinions of August 18th. That happened in the Fong case in which the Court made the determination that the Court had jurisdiction to hear the cases.

They handed down the decision of November 24th in the case of Chow Sing. Now, at that time, the

time the decision was handed down on November 24, 1954, the Court had not yet handed down its decision in the Ly Shew case.

I would like to read a short paragraph with regard to the validity, or the claim of relationship as decided by Judge Mathews in the opinion of November 24:

"Sing appeared at the trial and by his guardian ad litem introduced evidence, some of which tended to show that Chow Yit Quong was the father of the person known as Chow Sing and that Sing was that person. Some of the evidence so [42] pending was uncontradicted. However, the District Court was not required to believe such evidence or accept it as true."

That went under Rule 52 which says the Circuit Court will not reverse the judgment of this Court on findings unless they are clearly erroneous.

Subsequently that opinion of November 24th was set aside and a new opinion remanding it to this Court filed after the Court of Appeals had handed down its decision in the Ly Shew case dated December 30th. There were subsequent modifications, as the Court knows, of January 4th, January 5th and January 6th.

Therefore, after the Court of Appeals had decided and reversed the older determination in the Ly Shew case they came to the conclusion that the standard of proof which had been expressed in Your Honor's opinion was not the standard of proof to be applied in these cases. And since the Court in this Chow Sing case at the time of judgment has

stated that the plaintiff failed to meet the standard of proof as fixed by Ly Shew in the Atchison case, the Court had no alternative but to remand this case in the same manner as the other case. And as the Court has pointed out in here, most of the evidence was uncontradicted. There was evidence tending to establish the validity of claim and the fact that this boy was that man's son.

In addition, you have the remarks of Your Honor as to [43] your feeling that this relationship existed.

I think the entire claim is well-founded, and I wouldn't be before this Court urging a declaritory judgment of United States nationality unless I felt that this boy was a citizen of the United States.

Mr. Collett: Well, if the Court please, if I may have just one word, counsel has injected into this——

The Court (Interposing): Well, I don't think we want to spend time on those extraneous matters, Mr. Collett. I have enough to do deciding these findings without deciding what happened before.

Mr. Collett: For no good reason that I can see he injected some possible wrong-doing on the part of the Government and I would reply to that. It has no bearing whatsoever and there was no necessity for that at all at this time.

Mr. Gale: May I ask Mr. Collett's remarks in the Chow Sing case be considered by the Court in connection with the other case?

The Court: I will consider them all together.

I think the best thing to do, gentlemen, is to sub-

mit this matter, and I will file some supplemental memorandum in the case and follow the mandate of the Circuit Court of Appeals as best I can. Mark the matter submitted.

Mr. Gale: Will it serve any purpose for either of us to file any memorandum? [44]

The Court: Well, I have the whole record.

Mr. Hertogs: Does the Court desire copies of the briefs which were filed in the Circuit Court of Appeals for both sides?

The Court: I have the complete record of these cases.

I have everything available to me that I really need.

Mr. Hertogs: There were briefs and re-briefs and ——

The Court: Every time a brief is filed in any case the Clerk of the Court of Appeals always sends it to the District Judge.

Mr. Gale: I want to point out one thing, if your Honor will permit.

Your Honor in your opinion made the statement, perhaps not thinkingly, that all the testimony in the Ly Shew case was in the Chinese language. That, your Honor, is not correct. There was English testimony also in that case and perhaps your Honor in re-reading the record will keep that fact in mind.

The Court: Well, all the material testimony, I think.

Mr. Gale: No, there was testimony by children of Ly Shew and other witnesses in the English language.

Mr. Hertogs: The same is true in my case, your Honor. I think three out of the four witnesses were in English.

Mr. Gale: We had both, but your Honor, in the Ly Shew opinion, made the statement, that perhaps wasn't intended as [45] such, and your Honor again reiterated in your remarks from the Bench that "where all the testimony was in the Chinese language."

Ly Shew's testimony and the children's testimony was in the Chinese language, but other children and other witnesses were in the English language. Perhaps you Honor might keep that fact in mind in re-evaluating the testimony.

The Court: All right, I will mark the matter submitted.

Certificate of Reporter

I, Official Reporter pro tem, certify that the foregoing transcript of 46 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my ability.

/s/ KENNETH J. PECK.

[Endorsed]: Filed March 23, 1955. [46]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Mandate of the U. S. Court of Appeals;

Findings upon remand from the Court of Appeals;

Judgment;

Notice of appeal;

Designation of Record;

Cost bond on appeal;

Reporter's Transcript, March 11, 1955 (as in the Ly Shew vs. Dean Acheson case).

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of July, 1955.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 13746. United States Court of Appeals for the Ninth Circuit. Chow Sing, by His Guardian Ad Litem, Chow Yit Quong, Appellant, vs. Herbert Brownell, Jr., as Attorney General of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Central Division.

Filed July 11, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,746

CHOW YIT QUONG, Guardian Ad Litem for CHOW SING,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY IN THE APPEAL OF THE ABOVE-ENTITLED MATTER

Comes now Chow Yit Quong, Guardian Ad Litem for Chow Sing, by and through his attorney, Joseph S. Hertogs, and files herein the statement of points on which appellant intends to rely in the appeal of the above-entitled matter:

I.

That the findings of the District Court are clearly erroneous.

II.

That the District Court failed to comply with the mandate of this Court.

III.

That the findings, conclusions and judgment of the District Court are unsupported by the evidence of record.

IV.

That the findings, conclusion and judgment of the District Court are contrary to the evidence of record.

V.

That the District Court erred in findings that the plaintiff-appellant did not have a claim to permanent residence within the Northern District of California or in the United States of America.

VI.

That the District Court erred in concluding that the plaintiff-appellant, Chow Sing, is not a United States citizen.

JACKSON & HERTOGS,
Attorneys for Appellant,

By /s/ JOSEPH S. HERTOGS.

[Endorsed]: Filed July 27, 1955.